No. 77-926

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

1. The private respondents argue that this Court should not recognize an implied private right of action under Title IX of the Education Amendments of 1972 because to do so would be to involve federal courts improperly in the admissions process at private graduate and professional schools (Resp. Br. 6, 13-16).[1] They assert that acceptance of petitioner's position in this case would force such schools to base their admissions decisions "solely on quantifiable factors such as test scores" (*id.* at 6). We disagree. Nothing in the position advocated by petitioner and the federal respondents justifies the private respondents' purported fears. The spectre of trial judge as admissions officer, infringing the academic freedom of private universities (*id.* at 13, 15-16), is a baseless fear.

[1]"Resp. Br." refers to the joint brief of the private respondents. When the meaning is clear from the context, the private respondents will sometimes be referred to simply as "respondents." The abbreviation "Br." will be used to refer to the principal brief of the federal respondents.

If petitioner prevails in this lawsuit, the victims of sex discrimination in federally funded education programs will be able to seek redress for their injuries in federal court.[2] The courts' task in cases like this is not, as respondents suggest, to choose among hundreds of qualified applicants and decide which should be admitted to graduate and professional schools around the country. The courts' task is not to review the numerous factors considered by admissions committees and decide the appropriate weight to be assigned to each. If the judgment of the court of appeals in the present case is reversed, the University of Chicago Pritzker School of Medicine will remain free to make its admissions decisions "on the basis of the ability, achievement, personality, character, and motivation of the candidates" (Resp. Br. 13).[3] The Pritzker School and other medical schools will not be deterred from making their final selections by reference to such personal qualities as "[h]onesty, intellectual curiosity, imagination, cooperativeness, friendliness, and a willingness to work long hours" (*id.* at 14). Indeed, no change in the admissions process at respondent schools will be required by the decision in this case.

---

[2]The private respondents' brief contains language characterizing the question presented here as a jurisdictional one. See Resp. Br. 3-5, 46-47. This is incorrect. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946), held that, when a complaint asserts a claim arising under the Constitution or laws of the United States, federal courts do have jurisdiction to decide whether the complaint states a cause of action on which relief can be granted. The question whether a particular statute provides a private right of action is substantive, not jurisdictional. As the Court's opinion in *Bell* plainly stated, "[i]f the court * * * determine[s] that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction" (*ibid.*).

[3]Although the private respondents acknowledge that the merits of petitioner's sex discrimination claims are not at issue in this Court (Resp. Br. 11), they devote substantial energy to an attempt to show that petitioner was properly denied admission to the University of Chicago medical school (*id.* at 6, 10-11 & n.5). Petitioner's personal qualifications are, of course, irrelevant to the question here presented. The issue is not whether petitioner suffered discrimination but whether she is entitled to have the matter resolved in federal court.

Title IX prohibits sex discrimination in admissions to federally funded graduate and professional schools. This point is undisputed. Whatever the result here, the private respondent will not be permitted to discriminate on the basis of sex in choosing their medical students, so long as respondent schools continue to receive federal funds. The only question presented here is whether federal courts may provide relief to the victims of sex discrimination that violates Title IX. If that question is answered affirmatively, courts in cases like this will ask only whether the decision to reject a particular applicant was the product of illegal sex discrimination. If the decision was based on other factors, the defendant school will prevail, and it will not matter what the other factors were. If, on the other hand, the plaintiff applicant was rejected on the basis of sex, the court will order an appropriate remedy and the policy underlying Title IX will be vindicated.[4]

---

[4]The private respondents seem to argue (Resp. Br. 15 n.11) that, even if Title IX does create a private cause of action, federal courts may not award injunctive relief for past discrimination if the recipient of federal funds responsible for the discrimination decides to forego further federal aid. This cannot be the case. When educational institutions accept federal financial assistance, they agree to comply with a variety of antidiscrimination provisions, including Title VI of the Civil Rights Act of 1964, Title V of the Rehabilitation Act of 1973, and Title IX. If they nevertheless discriminate in violation of one or more of these statutes during the period when they are receiving federal funds, they should not be permitted to escape all consequences of that discrimination by the simple expedient of refusing further aid. To hold otherwise would be to sanction the use of at least some federal monies in a discriminatory manner—precisely the result Congress sought to eliminate by enacting Title IX, Title VI, and Title V. In any event, the Court need not now resolve the question of what remedies would be available in a private suit

2. a. The private respondents make two arguments based on the so-called "doctrine of exhaustion of administrative remedies" (Resp. Br. 33-38). They maintain first that "no judicial intervention would be appropriate until * * * [the Department of Health, Education, and Welfare] has completed its investigation and review functions under Section[ ] * * * 902" (*id.* at 33). Although this contention has been answered in the main brief for the federal respondents (Br. 58 n.36), a few additional remarks may be helpful.

Exhaustion of administrative remedies is ordinarily a prerequisite to review of agency action. See *Green Street Association* v. *Daley*, 373 F. 2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967). This general rule follows from the recognition that, until available administrative procedures have been used, an agency decision is not final for purposes of judicial review.[5] As the present case comes to this Court, however, petitioner does not seek review of agency action. Rather, she seeks direct relief from the allegedly discriminatory conduct of respondent medical schools.

Of course, Congress may create an administrative scheme for the handling of certain kinds of complaints against private parties and, in some such circumstances, may provide that complainants should resort to the administrative process before invoking the aid of the courts. This sort of "exhaustion" requirement is wholly different from that described above. Under statutes of the kind discussed here, "exhaustion" is necessary not because

---

under Title IX. Neither the district court nor the court of appeals addressed that question, and it is properly left for initial consideration on remand.

[5]Where it is clear that an agency decision is final even though available procedures have not been used, courts may undertake review without requiring formal exhaustion. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

it is a logical precursor to final agency action, but because Congress has decided that courts should not be asked to resolve certain disputes until the appropriate administrative body has had a chance to do so. "Exhaustion" in this sense is a statutorily prescribed jurisdictional prerequisite to certain kinds of litigation. The critical point in this connection is that when Congress decides to establish such jurisdictional prerequisites, it does so explicitly. Title II and Title VII of the Civil Rights Act of 1964 are typical examples. Both require some form of resort to available state and local enforcement schemes before a federal civil action may be filed. Title VII also requires the filing of a charge with the Equal Employment Opportunity Commission as a prerequisite to federal litigation.[6] See Br. 27 n.19. Another example of this kind of statute is Title III of the Older Americans Amendments of 1975, as amended by Section 401(c) of the recent Comprehensive Older Americans Act Amendments of 1978, Pub. L. No. 95-478, 92 Stat. 1555-1556. (The recent amendments are discussed at page 13, *infra*.)

By contrast, in Title IX of the Education Amendments of 1972, Congress did not require resort to the administrative process as a precondition to lawsuits challenging alleged sex discrimination by private recipients of federal funds. Moreover, the administrative procedure that Congress did provide in Section 902 of the

---

[6]Even if the EEOC promptly takes final action on an employment discrimination charge, the complainant is entitled to *de novo* consideration of his Title VII claim in a subsequent civil action. *Chandler* v. *Roudebush*, 425 U.S. 840, 844-845 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). The availability of this kind of judicial remedy underscores the difference between exhaustion as a logical precondition to final agency action (typically reviewed under a "substantial evidence" or "arbitrary and capricious" standard) and compulsory resort to the administrative process as a jurisdictional prerequisite to a federal civil action (frequently involving *de novo* fact finding).

Amendments, 20 U.S.C. 1682, does not even contemplate the participation of complaining victims of alleged illegal discrimination or the administrative award of individual relief to redress injuries suffered as the result of such discrimination. It should be plain, therefore, that Congress did not intend to require resort to the administrative procedure as a prerequisite to private suits under Title IX.

The main thrust of the private respondents' brief, of course, is not that the administrative procedure in Section 902 of the Amendments must be "exhausted" before private recipients of federal funds may be sued, but that such recipients may not be sued at all by the victims of sex discrimination, in violation of Title IX. Respondents' primary argument concerns not the exhaustion of administrative remedies, but rather the exclusivity of such remedies. As the principal brief for the federal respondents argues (Br. 49-51), however, the administrative mechanism in Section 902 should not be regarded as the sole means of enforcing the broad guarantee set forth in Section 901. The administrative fund termination procedure is not an exclusive remedy because it is not designed to ameliorate injury suffered by the individual victims of discrimination. As a practical matter, HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries. An implied private right of action is necessary to ensure that the fundamental purpose of Title IX, the elimination of sex discrimination in federally funded education programs, is achieved.

b. The private respondents' second "exhaustion" argument is more properly termed a "primary jurisdiction" theory. Respondents contend that there should be no private litigation under Title IX until HEW has developed a "national policy" for the statute's implementation. They assert that petitioner's complaint in the

present lawsuit "illustrates * * * the inappropriateness of a case-by-case approach" (Resp. Br. 35). This argument is both incorrect and disingenuous. It is disingenuous because it suggests that the private respondents would be willing to countenance private litigation under Title IX if HEW would first issue uniform standards for the statute's enforcement. This is inconsistent with respondents' basic contention that Title IX provides *no* private right of action whatever. The private respondents have not asserted that the district court erred in failing to stay petitioner's suit while HEW completed action on her administrative grievance. Rather they have argued that the district court acted correctly in dismissing the complaint for failure to state a claim on which relief could be granted. This position is far more drastic than a simple plea for a uniform, administratively developed national policy. Respondents would preclude private litigation altogether; they would not merely postpone private suits so that courts could have the benefit of prior administrative action.

Respondents' primary jurisdiction argument is not only irreconcilable with their fundamental contention in this case but it ignores the role of Title IX itself as a declaration of national policy. Congress, not HEW, has decided to prohibit sex discrimination in federally funded education programs. Courts are perfectly capable of enforcing that prohibition, just as they routinely enforce other antidiscrimination provisions. Respondents insist that case-by-case adjudication of Title IX complaints is inappropriate, but their argument disregards the fact that administrative consideration of individual complaints under Section 902 inevitably proceeds on a case-by-case basis, as does the judicial review of agency action for which Section 903 provides.

Moreover, the administrative and judicial handling of Title IX grievances need not be mutually exclusive processes. If, in a private action under Title IX, a proper

need arises for the court to ascertain the views of the funding agency on the events in question, it may stay its hand until an already pending administrative investigation is completed or until the plaintiff in the private suit has filed an administrative complaint and the agency has acted on it. Likewise, when a private suit is filed after substantial progress has been made in the administrative handling of an earlier complaint to the agency based on the same subject matter, the agency may ask the court to defer action in order to afford the administrative process an opportunity to produce a satisfactory solution. This is precisely what occurred in *Terry* v. *Methodist Hospital of Gary*, Civ. No. 76-373 (N.D. Ind.), a case that the private respondents incorrectly characterize as inconsistent with the position taken in the federal respondents' main brief. Here, petitioner's complaint was dismissed because the district court believed that Title IX did not create a private right of action. This was not a question that HEW could hope to resolve administratively, and accordingly further administrative action on petitioner's complaint was postponed pending the outcome of this suit. By contrast, in *Terry* a private Title VI suit challenged the alleged discriminatory effect of a federally financed hospital relocation in Gary, Indiana. Some time after the complaint in *Terry* was filed, HEW decided to review the entire hospital situation in the Gary community, in response to an earlier administrative complaint from another party. The agency therefore asked the court to defer proceedings in the civil suit until administrative compliance efforts could be completed. The court refused, but a settlement acceptable to all parties was nevertheless concluded before the court rendered any decision on the merits in the private action.

The agency's position in *Terry* was consistent with that adopted by the federal respondents here. The federal respondents' principal brief stated that "the Court need

not reach the question whether it might be appropriate in some situations for a district court to defer action on a private Title IX complaint pending completion of an ongoing administrative investigation or pending the outcome of informal negotiations directed toward achieving voluntary complaince with Title IX" (Br. 60 n.36). This statement is correct, because the private respondents urged the district court to dismiss petitioner's complaint and the district court did so. As it now stands, this case does not present the question whether the district court should have stayed proceedings in petitioner's lawsuit until HEW completed its administrative investigation. The only issue for decision is whether Title IX authorizes private actions in the first place. Although the private respondents assert that "[t]here is considerable confusion in HEW's position" (Resp. Br. 38 n.27), they have not identified any material respect in which the agency's arguments here differ from those previously advanced in other cases.[7]

---

[7]In addition to *Terry*, the private respondents cite *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1978), appeal pending, Nos. 78-1616 and 78-1943 (3d Cir), as a case that reveals inconsistencies in HEW's arguments. A review of the issues raised in *Wilmington* and the litigating position taken by the government there demonstrates that the private respondent's charge is unsupported.

The complex history of the *Wilmington* litigation is fully described in HEW's brief on appeal to the Third Circuit, a copy of which has been lodged with the Clerk of this Court. The case involves a challenge to the relocation of part of the Wilmington Medical Center hospital facilities. Minority and handicapped residents of Wilmington, Delaware alleged that the move of a federally funded facility from an inner city location to a suburban site discriminated on the basis of race and handicap, in violation of Title VI of the Civil Rights Act and Title V of the Rehabilitation Act. After a lengthy investigation, HEW entered into a voluntary compliance agreement with the medical center, approving the relocation but imposing certain conditions designed to guarantee minority and handicapped pa-

3. Yale University, in its brief as amicus curiae in support of the private respondents, contends that no private right of action is properly implied under Title IX, because that statute represents an exercise of Congress' spending power, rather than one of its enumerated powers to legislate in particular substantive areas. Yale begins with the premise that under the spending power Congress may impose conditions on the receipt of federal funds and

---

tients ready access to the relocated facilities. This agreement was concluded after plaintiffs had filed their civil action against HEW and the medical center in district court.

HEW steadfastly maintained that Title VI and Title V do authorize private suits against recipients of federal funds. Although the agency's position on this point remained constant after the voluntary compliance agreement was reached, HEW did not clearly inform the district court of its view concerning the proper relationship between judicial review of final agency action and private suits against recipients of federal funds. This failure led to the statement in the district court's opinion that the private respondents now stress (453 F. Supp. at 300; Resp. Br. 38 n.27). In its brief on appeal in *Wilmington*, HEW has argued that plaintiffs should have been required to choose between judicial review of final agency action (*i.e.*, the compliance agreement) under standards provided by the Administrative Procedure Act and a *de novo* proceeding in the district court on the Title VI and Title V complaint against the recipient medical center. See HEW Br. on Appeal at 35-43. HEW has contended that such a choice is necessary in order to avoid the wasteful and anomalous situation in which a court is forced to review the same underlying facts under two different standards. Whatever the merits of this argument, it is not inconsistent with the position taken by the federal respondents in the present case. In Wilmington, as here, HEW defended the existence of a private right of action under federal antidiscrimination provisions. Because the agency in *Wilmington* reached a voluntary compliance agreement before the end of litigation, it needed to state its view concerning the proper relationship between review of agency action and private suits against recipients of federal funds. Because no such final agency action has occurred here, the federal respondents simply observed in their principal brief that "[t]his case does not require the Court to determine the proper relationship between administrative and judicial proceedings in every conceivable set of circumstances that may arise under Title IX" (Br. 60 n.36). That observation remains accurate.

may thereby regulate certain activities not otherwise within the reach of the national legislative power. Because the spending power thus extends the potential scope of federal control, Yale argues, courts should be particularly reluctant to recognize implied private rights of action under spending power statutes.

It is not clear how or why this conclusion follows from the breadth of the congressional power to spend for the general welfare. Spending power statutes, like other federal laws, are passed in the expectation that they will be enforced, assuming they are constitutionally valid. Yale has not explained why judicial rather than administrative enforcement of spending power laws is likely to result in an undue expansion of federal authority. If anything, one might suppose that there would be a greater danger of such overreaching if the executive branch, through its funding agencies, were charged with the exclusive responsibility for Title IX enforcement, subject only to a limited judicial review.

Furthermore, although the Yale brief correctly characterizes *Rosado* v. *Wyman*, 397 U.S. 397 (1970), as a Supremacy Clause decision in which the cause of action was provided by 42 U.S.C. 1983 (Yale Br. 8 n.5), the fact remains that this Court there did entertain a private suit to enforce the provisions of a spending power statute, despite Congress' express provision of a detailed administrative enforcement scheme to ensure the compliance of state AFDC plans with federal requirements (Br. 56). Section 1983 provided the cause of action because the alleged constitutional and statutory violation occurred under color of state law. Likewise, Section 1983 would provide a cause of action for the enforcement of Title IX where the alleged illegal sex discrimination occurred under color of state law (Br. 57). The critical point to be derived from *Rosado* in connection with the argument raised in Yale's amicus brief is that the Court

there sanctioned enforcement of a spending power statute in a private suit, without fear of any unreasonable repercussions for the proper functioning of the federal system. This Court's decisions provide no reason to believe that recognition of an implied private right of action under Title IX would produce an accretion in federal power, and Yale itself has not explained why this should be the expected result.[8]

4. Finally, we reply briefly to three points made by the private respondents concerning statutes other than Title IX that bear on the proper resolution of the question presented in this case.

a. First, and most important, the 1978 amendments to Title III of the Older Americans Amendments of 1975 confirm the congressional understanding that private suits may be used to enforce antidiscrimination provisions unless Congress has explicitly stated a contrary intention.[9] Although the private respondents suggest that the 1978

---

[8]Yale also asserts that the federal respondents "have misconstrued the current posture" of the lawsuit pending against the university in the United States District Court for the District of Connecticut (Yale Br. 12 n. 16). The ruling cited in the federal respondents brief (Br. 18 n. 13, 57) was issued in December 1977 by a federal magistrate and subsequently endorsed by the district court. Although the claims of five plaintiffs were dismissed, the magistrate's ruling clearly reveals an inclination to permit private suits under Title IX. More important, any possible misconstruction of the magistrate's ruling has been rectified by the district court's recent decision denying Yale's motion to dismiss the complaint of the remaining plaintiff. *Price* v. *Yale Univeristy*, Civ. No. N-77-277 (D. Conn. Dec. 6, 1978). The court held that "a private right of action under Title IX may, and, in light of the testimony developed at the hearing before this court, must, be implied in the circumstances of this case" (slip op. 23).

[9]Such explicit intent to preclude all but the specified administrative remedy appears, for example, in Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), discussed in *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261, 264-265 (1940). The private respondents' reliance on that case (Resp. Br. 19) is therefore misplaced.

amendments provide support for their position on Title IX (Resp. Br. 42 n.32), the wording of the new law reflects Congress' recognition that antidiscrimination statutes need not contain express authorizing language in order to create a private right of action. See *Cort* v. *Ash*, 422 U.S. 66, 82 (1975).

Title III of the Older Americans Amendments of 1975, 42 U.S.C. 6101, *et seq.*, prohibits age discrimination in federally funded programs. The statute originally provided that the prohibition should be enforced exclusively through the administrative process. The statute and its legislative history are discussed in some detail in the main brief for the federal respondents (Br. 40-43). In 1978, Congress concluded that administrative delay in investigating and resolving complaints under Title III made it desirable to eliminate the exclusivity provision and to permit enforcement through private litigation. The task was accomplished by replacing the exclusive remedies provision, Section 305(e), 42 U.S.C. 6104(e), with the following provision (92 Stat. 1555):

> When any interested person brings an action in * * * district court * * * to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education and Welfare, the Attorney General of the United States, and the person against whom the action is directed. * * *

The critical feature of this new Section 305(e)(1) is that it does not in terms establish a private right of action, but only prescribes the notice requirement that must be met by a person who intends to file a private suit. Congress' choice of language indicates that deletion of the exclusive remedies provision alone would have sufficed to permit private suits, but that specific mention of such actions was

necessary in order to permit the addition of the notice qualification.[10] The 1978 amendments thus support implication of a private right of action under Title IX, which has never contained any provision stating that the administrative fund termination procedure in Section 902 is the exclusive remedy for illegal sex discrimination in federally funded education programs.

b. The private respondents take issue with the contention that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, creates a private right of action (Resp. Br. 34, 39-41). In particular, they criticize the citation of *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), in support of that proposition. The court of appeals in *Lloyd* permitted a private suit to proceed under Section 504, but it indicated that a different result might be expected after the issuance of HEW regulations establishing an administrative enforcement scheme like that provided in Section 902 of the Education Amendments (548 F. 2d at 1285-1288; Br. 39). It should be observed that *Lloyd* was decided by the court of appeals after the panel's first opinion in the present case. Although this case was pending on rehearing when *Lloyd* was decided, the *Lloyd* panel undoubtedly considered itself bound to some extent by the earlier ruling here. Moreover, the private respondents cannot

---

[10]The new Section 305(e)(2)(B) imposes a further prerequisite for private actions under Title III. The statute provides that no such action shall be brought "if administrative remedies have not been exhausted." In order to avoid the possibility of excessive administrative delay before a Title III suit may be filed, the new Section 305(f), 92 Stat. 1556, states that

> administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first.

and do not even attempt to explain away the other cases cited in support of private suits under Section 504 (Br. 38).

In addition, the legislative history of the most recent amendments to Title V corroborates Congress' understanding that Section 504 does authorize private suits. The private respondents note (Resp. Br. 41 n. 31) that a new Section 505(a)(2) has been added to Title V to make "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 * * * available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section 504 of this Act." Rehabilitation Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2983. Respondents fail to note, however, the addition of Section 505(b), which states (92 Stat. 2983):

> In any action or proceeding to enforce or change a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Senate committee report accompanying this provision leaves no doubt that Congress contemplates enforcement of Section 504 through private suits. See S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). The report states (*ibid.*):

> The committee believes that the rights extended to handicapped individuals under title V * * * are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

c. In aid of their argument that Title IX does not create a private right of action, the private respondents point to Section 906 of the Education Amendments of 1972 (Resp. Br. 29-31). At the same time that Section 901 of the Amendments prohibited sex discrimination in federally funded education programs, Section 906 amended Titles IV and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6 and 2000h-2, to permit the Attorney General to initiate suit against public colleges that deny admission on the basis of sex and to intervene in any action in federal court "seeking relief from the denial of equal protection of the laws * * * on account of * * * sex." As originally enacted, Title IV of the Civil Rights Act authorized suit by the Attorney General against any public college that denies admission on the basis of race, color, religion, or national origin; likewise, Title IX of the Act authorized the Attorney General's intervention in federal actions raising equal protection claims based on race, color, religion, or national origin. Section 906 of the Education Amendments simply added sex to this list of personal characteristics. As the legislative history cited by the private respondents shows, Section 906 was designed to close "loopholes" in the 1964 Civil Rights Act and to make Title IV and Title IX of the Act parallel the new prohibition on sex discrimination in federally funded education programs, just as Titles IV and IX had previously followed Title VI's prohibition on race discrimination in federally funded programs. See 118 Cong. Rec. 5808 (1972) (remarks of Senator Bayh). In short, Congress enacted Section 906 to make conforming amendments in Title IV and Title IX of the Civil Rights Act, not to indicate any intention to bar private suits under Title IX of the Education Amendments.[11]

---

[11]Title IV and Title IX authorize suit and intervention by the Attorney General without regard for whether the discriminating public college or the defendant in an equal protection suit receives federal funds. In addition, the Attorney General may sue under Title IV or intervene under Title IX without engaging in any of the voluntary compliance efforts prescribed by Title VI of the Civil Rights Act or Title IX of the Education Amendments. These distinctions provide further evidence that Section 906 should not be read as an implicit statement of congressional intent concerning the permissibility of private suits as a means of enforcing Title IX's prohibition on sex discrimination in federally funded education programs.

CONCLUSION

For these reasons, as well as the reasons set forth in the opening brief for the federal respondents, the judgment of the court of appeals should be reversed and the case remanded for further proceedings under Title IX.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12